
**Upper Tribunal**
**(Immigration and Asylum Chamber)** PA/11774/2018

THE IMMIGRATION ACTS

| Heard at Glasgow | Decision & Reasons Promulgated |
|---|---|
| on 21 November 2019 | on 27 November 2019 |

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

**V A H**

Appellant

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Maguire, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

## DETERMINATION AND REASONS

1. The appellant is a citizen of Iraq, from the KRG, aged 24. The respondent refused her claim on all grounds for reasons set out in a letter dated 23 September 2018. FtT Judge Farrelly dismissed her appeal by a decision promulgated on 30 April 2019.

2. The appellant sought permission to appeal to the UT on grounds of 1, errors in terms of risk due to having fled to join her husband in the UK, 2, errors in terms of section 117B(6) of the 2002 Act, and 3, errors in terms of entry clearance. The FtT refused permission. The appellant applied to the UT for permission, out of time.

3. UT Judge Hanson declined to extend time to admit grounds 1 and 3, which he held to be unarguable. He extended time and granted permission to argue ground 2 only, as having arguable merit relating to section 117B(6) of the 2002 Act and failure to consider "the hypothetical situation of the child returning to the KRG".

4. Ground 2 (i) challenges [37] of the FtT's decision, which said it was necessary to consider the likely position of the child if the appellant were not allowed to remain, and [40], which said that it would not be reasonable for the child to go to Iraq. These are said to be errors, the correct question being whether it was reasonable for the child to leave the UK.

5. Ground 2 (ii) says that findings at [37] on what the child would or would not do are not supported by evidence, and are in any event irrelevant to whether it was reasonable for the child to leave the UK.

6. Ground 2 (iii) is also directed against [37], saying that findings there misapply the law, are inadequately reasoned or irrational. (Mr Winter in submissions did not press the challenge to the extent of irrationality.) The ground maintains that it cannot be reasonable for the child to leave "where the family would be separated … and where both the appellant's husband and child are British and have the right to remain"; and that the outcome is inconsistent with case law in that "there were no strong reasons to stop direct contact between the child and parents, where the child and [his] father are European nationals".

7. Mr Winter said that ground 3, although permission was not granted, raised a matter which was relevant as overlapping with ground 2, failure to consider whether there was a sensible reason for the appellant to return with her child to apply for entry clearance. In making those submissions, he accepted that the appellant's prospects of being granted entry clearance were not as good as the judge had thought. The appellant had not shown she could meet the English language requirement (which is not arduous) but she had also failed to show that financial requirements of the rules could be met.

8. Representatives agreed that the leading cases on how to approach the best interests of children, and on whether it is reasonable to expect them to leave the UK, mostly involve the departure of both parents. Mr Winter suggested that the principal case where only one parent was to leave is *ZH (Tanzania) v SSHD* [2011] UKSC 4 - to which the FtT referred at [33].

9. Mr Winter's overall submission was that the judge's approach to the essential question was so muddled that the decision had to be set aside and remade. For that purpose, he sought a fresh hearing in the FtT, at which further evidence was likely to be led.

10. Mr Govan submitted that it had never been the law, or the policy of the SSHD, that a UK citizen child could never be expected to leave, and that the issue was always to be decided on the facts of the case. He said that the grounds were semantic disagreements with selected passages. The correct question was posed at [35], derived from *KO and others*, approving *EV (Philippines)*, "Is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?" Mr Govan observed that this envisaged the child departing with one parent, not necessarily two.

11. Mr Winter in reply said that section 117B(6) raises a stand-alone question, not a balancing exercise with the appellant's circumvention of the immigration rules, and that the judge failed to explore what the parents would in fact do in the event of the appellant's removal.

12. I reserved my decision.

13. I am not persuaded that the judge lost sight of the vital issue. To express himself in slightly different ways at different points is only part of the overall assessment.

14. The criticism at ground 2 (i) of asking about the likely position of the child on departure of the mother is only another way of exploring what the parents would do. The judge cannot be wrong in both ways.

15. Any deficiency of findings about what the appellant and her husband would do is due to lack of evidence and their reluctance to face the issue, not the fault of the judge.

16. There is no meaningful difference between asking whether it would be reasonable for the child to go to Iraq, when that is the practical alternative, rather than whether it was reasonable for the child to leave the UK.

17. There is nothing to suggest that the judge was wrong in thinking at [37] that in fact it was likely the child would go with its mother; and that was exactly the hypothesis on which a decision was required.

18. It is not axiomatic, and is not said in *KO*, that it is always unreasonable to expect a child to leave with a mother if the husband and child are UK citizens. All depends on the circumstances.

19. While each case turns ultimately on its own facts, some comparison with *KO* is instructive. The father there was a UK national who could not be expected even to visit his children abroad. The father in this case was

originally an Iraqi national. Whether he retains that citizenship was not explored, but is at least possible. No reason was advanced why he might not visit or live in Iraq.

20. Contrary to ground 2(iii), this case does not involve any necessary separation of family members and does not "stop contact".

21. The evidence did not show that the appellant had a strong prospect of being granted entry clearance. There is no reason to think she could not tackle the language test, but there was a void of evidence on the financial requirements. This was not a *Chikwamba* case. However, any lack of clarity on that issue in the decision is immaterial, as the judge's conclusion stood either way – [39 - 40].

22. The grounds overstate the position for the appellant on the facts and on the law. They do not show that the judge failed to ask the correct question, or that he gave an answer which was not permitted by the case law, or which was unreasonable on the evidence presented. The grounds resolve into no more than disagreement.

23. The decision of the First-tier Tribunal shall stand.

24. The FtT made an anonymity direction. The matter was not addressed in the UT. This decision is anonymised.

22 November 2019
UT Judge Macleman